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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-939**LARRY A. BLIZZARD, ET AL.,***Petitioner,*

v.

FRANK L. MAHAN, ET AL.,*Respondents.*

**BRIEF OF RESPONDENTS
IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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OPINIONS BELOW

In a Memorandum Decision filed August 11, 1977, a panel of the United States Court of Appeals for the Fourth Circuit affirmed the Order of the United States District Court for the Eastern District of North Carolina dismissing the Petitioner's Complaint filed pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983. Blizzard v. Mahan, No. 76-2233, mem. dec. (4th Cir., August 11, 1977). Blizzard then filed a Petition for Rehearing and Suggestion for Rehearing En Banc which was denied October 4, 1977, no Judge having requested a poll on the Suggestion for Rehearing En Banc. A copy of the Memorandum Decision of the United States Court of Appeals for the Fourth

Circuit (A. pp. 14, 15), and the Order of the United States District Court for the Eastern District of North Carolina (A. pp. 16-23), are appended to Blizzard's Petition. From the judgment below, Blizzard has filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether A Prisoner Has A Constitutional Right To Possess His Personally Owned Typewriter?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

United States Code:

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, an inmate in the custody of the North Carolina Department of Correction, brought this action under 42 U.S.C. §1983, seeking injunctive relief and monetary damages. He sued Frank L. Mahan, Superintendent of the prison unit where he was housed; Ralph Edwards, Director of the Division of Prisons of the North Carolina Department of Correction; and David L. Jones, then Secretary of the North Carolina Department of Correction. In his Complaint he alleged that until December 14,

1975, he was permitted to possess his personally owned typewriter which he used in preparing court petitions for himself and other prisoners, and in personal correspondence. On December 14 according to his Complaint, Defendant Mahan enforced the regulations of the Department and ordered that all typewriters in the possession of inmates be either placed in storage or sent home. Petitioner filed a Motion for Summary Judgment with the District Court and Defendants moved to dismiss Petitioner's Complaint. The District Court treated Defendants' Motion as one for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure and dismissed the Complaint. The Court of Appeals for the Fourth Circuit affirmed *per curiam* the Order of the District Court.

ARGUMENT

A PRISONER HAS NO CONSTITUTIONAL RIGHT TO POSSESS HIS PERSONALLY OWNED TYPEWRITER.

That neither a state nor a federal prisoner has a constitutional right to possess a typewriter, whether personally owned or otherwise, has been held by every federal court which has considered the question. *Eisenhardt v. Britton*, 478 F.2d 855 (5th Cir. 1973); *Sprouse v. Moore*, 476 F.2d 995 (5th Cir. 1973); *Stubblefield v. Henderson*, 475 F.2d 26 (5th Cir. 1973); *Tarlton v. Henderson*, 467 F.2d 200 (5th Cir. 1972); *Williams v. United States Department of Justice*, 433 F.2d 958 (5th Cir. 1970); *Durham v. Blackwell*, 409 F.2d 838 (5th Cir. 1969); *Bijeol v. Benson*, 404 F.Supp. 595 (S.D. Ind. 1975), remanded for consideration on other grounds, 556 F.2d 584 (6th Cir. 1977); *Laaman v. Hancock*, 351 F.Supp. 1265, 1271 (D. N.H. 1972); *McDonnell v. Wolff*, 342 F.Supp. 616, 618-19 (D. Neb. 1972), modified 483 F.2d 1059 (8th Cir. 1973), aff'd in part, reversed in part sub nom. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

The unanimity of these lower federal court decisions is a compelling demonstration that typewriters are not required for inmates to have meaningful access to the courts. It is these courts which have daily contact with prisoner petitions and which are in the best position to determine whether typewritten prisoner complaints are so far superior to handwritten ones as to necessitate a constitutional right that typewriters be made available to prisoners for use in petitioning the courts. As the United States Court of Appeals for the Fifth Circuit noted in *Eisenhardt v. Britton*, *supra* at 201, "the availability of a typewriter is not necessary for judicial review."

Because he cannot cite any case law supporting his proposition, Petitioner attempts to show that certain decisions of this Court mandate by implication that prison administrators must permit prisoners to possess and use their personally owned typewriters in preparing court petitions. He cites as authority for this argument *Johnson v. Avery*, 393 U.S. 483 (1969), *Procunier v. Martinez*, 416 U.S. 396 (1974), and *Bounds v. Smith*, 430 U.S. 817 (1977).

It is correct that this Court held in *Bounds* that the State must provide law libraries or some alternative in order that inmates may have meaningful access to the courts. But as Mr. Justice Rehnquist noted in *Ross v. Moffitt*, 417 U.S. 600, 611-12 (1974), constitutional rights do tend "to declare themselves absolute to their logical extremes." Petitioner's argument carries the right of access to the courts beyond the "limits" and to the point of the absurd.

Respondents readily acknowledge that "[a] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner . . ." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). However, in *Pell* this Court nonetheless recognized "the familiar proposition that "[l]awful incarceration brings about the necessary withdrawal or limitations of privileges and

rights, a retraction justified by the considerations underlying our penal system.'" As associational rights protected by the First Amendment are among the most obvious to be curtailed by the fact of incarceration, *Jones v. North Carolina Prisoners' Labor Union*, ____ U.S. _____. 53 L.Ed. 2d 629, 638, 97 S.Ct. 2532, 2538 (1977), the right to possess personal property is likewise severely limited when one is confined in a prison. Petitioner's conviction itself has "sufficiently extinguished" his interest in maintaining personal possession of his typewriter. Cf. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

The Petitioner finds the right to possess his personal typewriter falls under the curtilage of the First Amendment in that use of the typewriter is necessary to facilitate his access to the courts. Petitioner's position is neither supported by case law, as noted above, nor by logic.

The District Court stated in the case at bar that the *Rules of Court of the United States District Court for the Eastern District of North Carolina* do not require that petitions and pleadings from prisoners be typed. Petitioner maintains though that handwritten pleadings bear a "badge of inferiority." Petitioner does not explain why a typewritten complaint in which the rules of capitalization, punctuation, sentence structure and grammar are egregiously violated bears any less of a "badge of inferiority" than a similarly handwritten petition. It might as well be argued that a complaint in one's own handwriting is superior because it bears a "hallmark of sincerity."

However, the Fifth Circuit in *Tarlton v. Henderson*, *supra* at 201, finds specifically that "a litigant's cause is not prejudiced by the filing of a handwritten brief." In fact many federal courts are now providing forms on which the inmate petitioner simply

fills in the blanks. There is no requirement that the responses be typed.¹

In his Petition for Writ of Certiorari, Petitioner at page 10 quotes the following language in *Bounds v. Smith*:

Our decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the court. It is indisputable that indigent inmates must be provided at State expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. 430 U.S. at 824-825.

Petitioner apparently interprets this quotation to mean that *Bounds* requires States to provide an inmate with any tool which makes his access to the court more convenient. The court of course in *Bounds* held no such thing. The issue before the Court in that case was stated by Mr. Justice Marshall as being "[w]hether States must protect the rights of prisoners to access

¹See, e.g., *MODEL FORM FOR USE IN APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. §2254* following Rules governing Section 2254 cases.

See also RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN FEDERAL COURT (F.J.C.—R-77-5) Federal Judicial Center. This report, prepared under the direction of Judge Ruggero J. Aldisert, recommends various forms for use under 42 U.S.C. §1983. These forms are being adopted by Local Rule of many District Courts; e.g., the Federal District Court for the Eastern District of North Carolina expressly authorizes and requires the use of these forms. (Rule 20, Rules of Court of the United States District Court for the Eastern District of North Carolina.) These forms expressly notify the prisoner that they may be handwritten.

to the courts by providing them with law libraries or alternative sources of legal knowledge." 430 U.S. at 817. The court's answer to this question was that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing inmates with adequate law libraries or adequate assistance from persons trained in the law."

Petitioner asserts that as a part of the State's affirmative obligation to assure access to the courts, the State must provide "a reasonable alternative if the State denies inmates use of their personal typewriters." Petition for Writ of Certiorari, p. 10. Quite obviously under *Bounds* the State must provide an indigent inmate with necessary writing implements and paper for his court petitions. This the Department of Correction has been doing even before *Bounds*. The Department's regulation on this subject is codified at 5 North Carolina Administrative Code 2G.0202 as follows:

Inmates will be provided with paper and writing implements to petition the courts for review of their cases or to file complaints concerning any matter. Carbon paper will be provided so that the inmate may make two copies of his petition or complaint. One copy will be mailed directly to the court with the original. The inmate will be allowed to keep the second copy for his personal use.

Indigent inmates are allowed up to fifteen letters per month postage free, but there is no limitation on free postage for mail to attorneys, courts, and State and federal officials. 5 North Carolina Administrative Code 1C.1102(c)(3). Thus, even before *Bounds* the Department of Correction had "shoulder[ed] affirmative obligations to assure all prisoners meaningful access to the courts."

Petitioner seems to argue that anything which would materially advance an inmate's access to the Court is constitutionally required. But as Chief Justice Burger pointed out in his concurring opinion in *Jones v. North Carolina Prisoners' Labor Union* *supra*, 53 L.Ed. 2d at 646, 97 S.Ct. at 2544, everything that is desirable is by no means mandated by the Constitution. In terms of access to the Court, an inmate's desire to use his personal typewriter in preparing court petitions simply cannot be equated with the need for law libraries or other form of legal assistance.

In compliance with the District Court's Order in *Bounds*, the Department of Correction, taking into consideration its peculiar needs, drafted a comprehensive plan that it considered best for providing legal assistance to inmates. This plan went beyond simply providing law libraries—it provided for trained inmate legal assistants, forms, stenographic assistance, and copying facilities. Petitioner makes much ado about the fact that the State provided for typewriters in its proposal. Again, however, Petitioner merely confuses that which is desirable with that which is constitutionally required.

Petitioner also asserts that the District Court failed to balance the inmate's need for his personal typewriter against the State's interest in prohibiting his possession of it while in prison. Where a petitioner can assert no constitutional right, the Court may dismiss his petition without requiring any further showing from the State. However, it is obvious that possession of typewriters by inmates can create serious management problems. As there are in excess of fourteen thousand inmates in the North Carolina prison system, under Petitioner's logic each of these inmates would have a right to his personal typewriter. The storage problem alone would be monstrous. And this fact is true even though only a small percentage of inmates might desire their personal typewriters. Moreover, typewriters would create a noise

problem. An inmate with a typewriter would disturb other inmates. (For the same reason, the Department bans the playing of radios without earphones.) Furthermore, the presence of a typewriter in a cell block would create a danger to security. First, there is a real possibility that the typewriter would be stolen from its owner. Second, the typewriter would be a most convenient hiding place for contraband such as heroin. Finally, parts of a typewriter can be fashioned into weapons. The facility of inmates to fabricate weapons from the most apparently innocuous objects is a fact well known to persons familiar with the daily routine of prison life. Obviously, the whole typewriter itself could be used as a most deadly weapon, given its weight and the materials with which it is constructed.

These reasons alone are sufficient to support the State's position in prohibiting possession of personal typewriters. In order to meet his burden of proof, Petitioner would have to show that these grounds are totally unreasonable and have no basis in fact. *See Jones v. North Carolina Prisoners' Labor Union, supra*, 53 L.Ed. 2d at 640, 97 S.Ct. at 2539. This, of course, Petitioner cannot do.

Finally Petitioner claims a First Amendment right to the possession of his typewriter merely because the typewriter is a means of communication. Under this logic, he might as well claim the right to a personal telephone. However, in any event, this Court has recognized that alternative resources may suffice when the State must limit some protected interest of a prisoner. *Procurier v. Martinez, supra*, 417 U.S. at 824. We have noted above that writing implements, paper and postage is available to inmates in the North Carolina prison system. There is no limitation on the number of letters an inmate may write and only a few highly limited restrictions concerning whom an inmate may write. Inmates also have liberal visitation privileges and access to telephones. They also have contact with outside organizations

(*See Jones v. North Carolina Prisoners' Labor Union, supra*.) A prisoner in the North Carolina prison system is quite clearly not held incommunicado by virtue of the fact that he is not allowed to have his personal typewriter. Alternative means of communication are fully available to this Petitioner and to other inmates in North Carolina.

CONCLUSION

For the foregoing reasons Respondents contend that Petitioner has no constitutionally protected interest in maintaining possession of his personal typewriter and, therefore, that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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